Supreme Court, U.S.
FILED
MAR 4 1992
OFFICE OF THE CLERK

No. 91-1267

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

B.J. ALAN COMPANY, INC.,
OLDE GLORY MARKETING, LIMITED,
NEPTUNE FIREWORKS COMPANY, INC.
AND CONSIGNED SALES COMPANY, INC.,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS UNITED PARCEL SERVICE, INC. (OH) AND UNITED PARCEL SERVICE, INC. (NY) IN OPPOSITION

JAMES F. MORIARTY
(Counsel of Record)
ROBERT L. KENDALL, JR.
JAMES D. CRAWFORD
SCHNADER, HARRISON, SEGAL & LEWIS
1111 Nineteenth Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 463-2978

Attorneys for Respondents United Parcel Service, Inc. (OH) and United Parcel Service, Inc. (NY)

Of Counsel:
EVERETT HUTCHINSON
FULBRIGHT & JAWORSKI
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a federal agency abused its discretion in refusing to reopen an administratively final decision that the Court of Appeals had unanimously affirmed and that the Supreme Court was then not asked to review, after the Court issued a later opinion in a different case that addressed a statutory provision not raised in the closed proceeding?

PARTIES TO THE PROCEEDINGS

The following entities were proper parties in the proceedings before the Court of Appeals below:

Interstate Commerce Commission
United States of America
B.J. Alan Company, Inc.
Olde Glory Marketing, Limited
Neptune Fireworks Company, Inc.
United Parcel Service, Inc. (an Ohio Corporation)
United Parcel Service, Inc. (a New York Corporation)

Respondents United Parcel Service, Inc. (OH) and United Parcel Service, Inc. (NY) are wholly owned subsidiaries of United Parcel Service of America, Inc.

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OPINION BELOW

The unreported *per curiam* opinion of the United States Court of Appeals for the District of Columbia Circuit is reprinted in Appendix A to the petition at 1a-5a, cited herein as "—a." The unreported decisions of the Interstate Commerce Commission ("ICC" or "Commission") denying petitions to reopen an administratively final decision are reprinted in Appendix A to petition at 8a-25a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition at p. 2.

STATUTES INVOLVED

The statutes involved are largely set forth in the petition at pp. 2-3. In addition, Section 10327(g)(1) of Title 49 of the United States Codes, 92 Stat. 1348, provides, as herein pertinent:

The Commission may, at any time on its own initiative because of material error, new evidence, or substantially changed circumstances—

(A) reopen a proceeding

COUNTERSTATEMENT OF THE CASE

The genesis of this dispute occurred in 1987 when UPS published a tariff item with the Interstate Commerce Commission discontinuing the transportation of explosive fireworks. The Commission fully considered and denied a petition by the fireworks shippers to suspend and investigate the tariff, which became effective on January 1, 1988.[1] After extensive discovery, briefing and arguments, the Commission found in 1989 that UPS did not violate its statutory common carrier obligation, which requires a motor carrier to provide service only upon "reasonable request". *B.J. Alan Co. v. United Parcel Service*, 5 I.C.C. 2d 700 (1989) (App. D to petition at 26a-60a).

In 1990, the United States Court of Appeals for the District of Columbia Circuit unanimously affirmed the ICC's decision, finding that the Commission had properly interpreted its organic statute and that substantial evidence supported the factual findings made. *B.J. Alan Co., Inc. v. I.C.C.*, 897 F.2d 561 (D.C. Cir 1990) The Court of Appeals cited with approval the Commission's conclusion that "even in the earliest rail cases, the obligation to provide service was not held to be absolute, but rather

[1] The United States Court of Appeals for the Sixth Circuit rejected the fireworks shippers' attempt to stay the Commission's decision not to suspend UPS's tariff item. *In re United Parcel Service, Inc.*, 839 F.2d 1195 (6th Cir. 1988).

was qualified by a rule of reason[.]" *Id.* at 564. The Court of Appeals then concluded, as had the Commission, that the transportation conditions attendant to fireworks are dramatically dissimilar from those applicable to other small packages, in that they require specialized handling and result in substantially increased costs, justifying UPS's discontinuance of service. Discontinuance is especially appropriate since other carriers were available to, and had actually been used extensively by, Petitioners. *Id.*, 5 I.C.C. 2d at 704. (Appendix D to petition at 28a, 46a, 48a).

Since the 1990 D.C. Circuit affirmance of the Commission, Petitioners filed twelve pleadings with the ICC seeking to reopen the administratively final decision.[2] The Commission fully considered and denied each reopening request. Docket No. MC-C-30093, *B.J. Alan Co., et al. v. United Parcel Service, Inc., et al.* (not printed), served June 18, 1990 and April 12, 1991. (App. B and C to petition at 8a-25a).

On the question of the applicability of the Court's decision in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), which Petitioners raise here, the Commission properly found that, unlike the filed rate doctrine,

> the common carrier obligation never has been absolute, since it is tempered by a reasonableness determination. 49 U.S.C. § 11101(a) requires only that a

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[2] Petitioners have also sought, and been denied, relief in this Court on three separate occasions. On August 21, 1989, Petitioners filed an application for stay with the Court pending appellate review, which the Chief Justice denied by letter dated August 22, 1989. On August 24, 1989, Petitioners filed a second application for stay with Justice Brennan, which the Court denied on August 30, 1989. *B. J. Alan Co., Inc. v. Interstate Commerce Commission*, 110 S. Ct. 29 (1989) (mem.). On May 23, 1990, Petitioners petitioned the Court for an extension of time to file a petition for writ of certiorari to the D.C. Circuit on its 1990 affirmance of the Commission. The Court denied that request and no writ was filed by Petitioners.

> carrier provide a service upon reasonable request . . . [D]ue to the difficulties, both operational and legal, that UPS has associated with the transportation of common fireworks, UPS can regard requests to transport fireworks as unreasonable and elect not to transport them.

Docket No. MC-C-30093, *B.J. Alan Co., et al.*, (not printed), served April 12, 1991. (App. B at 12a). The Court of Appeals agreed, finding Petitioners' claim "unreviewable or meritless" and concluding in a *per curiam* opinion that "*Maislin* does not . . . represent a change in the law governing the present case." (App. A at 3a). Petitioners seek review of the summary affirmance by the Court of Appeals of the Commission's refusal to reopen its 1989 decision in this matter.

REASONS FOR DENYING THE WRIT

1. Petitioners have not advanced any legitimate basis for the Court to grant certiorari. They have not identified, and there does not exist, any conflict among the Circuits or any far-reaching legal question requiring resolution by this Court. Indeed, the Petition is not from the 1990 decision of the Court of Appeals on the merits of the dispute, but rather from the lower court's summary affirmance of the Commission's refusal to reopen that proceeding over two years after it became final. Appropriately, the Court of Appeals for the District of Columbia Circuit concluded that this case merited only a *per curiam* memorandum opinion. Clearly, the Petition is frivolous and not worthy of review.

2. Petitioners have not contended, nor could they contend, that the circumstances triggering this litigation have occurred or are likely to occur with any frequency. As is evident from the foregoing counter statement of the case, this case involves a unique set of circumstances: a group of shippers that were unwilling or unable to comply with local and state regulations rendering the carrier's continued transportation of explosive fireworks

operationally and economically impracticable. None of the cases cited by Petitioners is remotely similar to the case at bar.

3. The basic substantive argument underlying the Petition is that, in Petitioners' view, the Interstate Commerce Commission and the Court of Appeals since 1987 committed error in failing to rule in their favor. This argument is wrong, is out of time, and in any event is insufficient to justify a grant of certiorari. It is well settled that this Court does not grant certiorari merely to give a litigant another chance at appellate review. *See* Supreme Court Rule 10. This rule is controlling here where Petitioners have flooded the Commission and the courts with meritless pleadings.

4. Petitioners rely solely on the Court's decision in *Maislin Industries, U.S. v. Primary Steel, Inc.*, 110 S. Ct. 2759 (1990), as requiring reopening of an administratively final decision. Far from the panacea claimed by Petitioners, the Court in *Maislin* held, in a narrow decision where the negotiated rate had not been filed, that a shipper must pay a carrier its filed tariff rate. In so doing, the Court reaffirmed a long line of decisions where it rejected exceptions to the strict application of the filed rate doctrine and held that the Commission cannot rely on policy initiatives to contravene a clear statutory directive.

a. The Court's overriding concern in *Maislin* was that the negotiated rate, which the shipper sought to enforce, had never been filed with, and thus was never found just and reasonable by, the Commission. *Maislin*, 110 S. Ct. 2761, 2766. In this proceeding, the opposite occurred. UPS filed its tariff item with the Commission and, following protests and complaints by fireworks shippers, the ICC, after lengthy deliberations and careful consideration, found the item lawful. Moreover, the Court of Appeals specifically reviewed the *filed* tariff item and unanimously affirmed the ICC's decision. Therefore, no comparison with *Maislin* is apppropriate or availing.

b. Unlike the Supreme Court's interpretation of the filed rate doctrine, the common carrier obligation of a motor carrier, which is at issue here, is not absolute. Under the statute, "[a] common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Act . . . shall provide the transportation or service on reasonable request." 49 U.S.C. § 11101(a). As the Commission explained,

> The Interstate Commerce Act, 49 U.S.C. § 11101, requires that a common carrier providing service subject to the Commission's jurisdiction shall provide such service upon *reasonable request*.

5 I.C.C. 2d at 710 (emphasis added) (App. D to petition at 40a). Unlike its filed rate decisions, the Court early on held that the common carrier obligation is not absolute; rather "the law exacts only what is reasonable from such carriers." *Pennsylvania Railroad Co. v. Puritan Coal Mining Co.*, 237 U.S. 121, 133 (1914). Based on that rule, the Commission found that "the obligation to provide service was not held to be absolute, but rather was qualified by a rule of reason that excused carriers from service failures that were reasonable under the prevailing circumstances." 5 I.C.C. 2d at 711. (App. D to petition at 41a). Consistent therewith, the Court of Appeals specifically noted that "[a]n unlimited duty of carriage was *never* the rule." *B.J. Alan Co., Inc. v. I.C.C.*, 897 F.2d 561, 564 n.3 (D.C. Cir. 1990) (emphasis added). The distinction here from the strict application of the filed rate doctrine recognized in *Maislin* could not be more striking.

c. Contrary to Petitioners' arguments, the Commission correctly considered the Motor Carrier Act of 1980 in determining the reasonableness of UPS's actions. In *Maislin*, the Supreme Court noted that the developments prompting passage of the Act could not be used to contradict the clear terms of the statute which did not attach any reasonableness qualifier to the field rate doctrine. *Maislin*, 110 S. Ct. at 2770. However, no contradiction

between the governing statute and the Commission's action is present here since the plain wording of the act requires that both the shipper's request, and the carrier's actions, be reasonable. 49 U.S.C. § 11101.

d. Petitioners rely inappropriately on two decisions where the Commission found that *Maislin* constituted a changed circumstance justifying the reopening of an ICC decision.[3] Petitioners fail to mention, however, that those two proceedings concerned the identical issue presented in *Maislin*, i.e., whether in the undercharge context, a carrier should collect the filed tariff rate. These decisions have no applicability here where the issue is not the filed rate doctrine, but whether a carrier need provide an operationally and economically impracticable service.

5. Petitioners attempt to distinguish *I.C.C. v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 280 (1987), where the Court found that when, as here, a party petitions for reopening of an earlier decision, an order denying that request is not reviewable. Petitioners' argument rests on two false assumptions: (i) that *Maislin* reversed the legal analysis of the ICC and the Court of Appeals as to the common carrier obligation and (ii) that the ICC and the Court of Appeals violated longstanding Supreme Court precedent. As already explained, this is not the case since the Commission and the lower court correctly applied relevant Supreme Court precedent. Similarly, Petitioners cannot distinguish the Court's holding in *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986), where, as here, "Petitioners have pointed to no specific statutory provision or legislative his-

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[3] Petition at 7, *citing Eastman Kodak Company—Petition for Declaratory Order—Certain Rates and Practices of Advance United Expressways, Inc.*, ICC Docket No. 40233 (July 8, 1991), *General Binding Corporation—Petition for Declaratory Order—Certain Rates and Practices of Advance-United Expressways, Inc.*, ICC Docket No. 40398 (July 12, 1991), both reprinted in Appendix F to petition at 84a-90a.

tory indicating a specific congressional intention to overturn" the Court's longstanding interpretation of the common carrier obligation. Therefore, the Court should deny the petition.

6. Petitioners did not seek Supreme Court review of the 1990 unanimous affirmance by the Court of Appeals of the Commission's 1989 decision in this matter. Rather, Petitioners filed numerous reopening requests with the Commission, all of which the agency rejected. As the Court has explained, with equal application here, if "litigants might demand rehearings as a matter of law because some new circumstance has arisen . . . there would be little hope that the administrative process could ever be consummated." *Bowman Transportation Co. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 294-95 (1974), *citing, ICC v. Jersey City*, 322 U.S. 503 (1944). *Accord, United States v. Utah Construction Co.*, 384 U.S. 394, 422 (1966). On that basis alone, the Court should deny the petition.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

JAMES F. MORIARTY
(Counsel of Record)
ROBERT L. KENDALL, JR.
JAMES D. CRAWFORD
SCHNADER, HARRISON, SEGAL & LEWIS
1111 Nineteenth Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 463-2978

Attorneys for Respondents United Parcel Service, Inc. (OH) and United Parcel Service, Inc. (NY)

Of Counsel:
EVERETT HUTCHINSON
FULBRIGHT & JAWORSKI
801 Pennsylvania Ave., N.W.
Washington, D.C. 20004